STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Docket No. 225017

TAXPAYERS OF MICHIGAN AGAINST CASINOS, a Michigan non-profit corporation, and **LAURA BAIRD**, State Representative, Michigan House of Representatives, in her official capacity,
Plaintiffs/Appellees,

Supreme Court No. 129822

Court of Appeals No. 225017

v.

THE STATE OF MICHIGAN,
Defendant/Appellant,

Ingham County Circuit Court
No. 99-90195-CZ

And

NORTH AMERICAN SPORTS MANAGEMENT COMPANY, INC. IV, a Florida corporation, and **GAMING ENTERTAINMENT (Michigan), LLC**, a Delaware limited liability company, **LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS**,
Intervening Defendants/Appellants.

REPLY BRIEF – INTERVENING APPELLANT LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS

ORAL ARGUMENT REQUESTED

THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.

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ABBREVIATIONS

GE	Gaming Entertainment (Michigan), LLC
IGRA	Indian Gaming Regulatory Act
LTBB	Little Traverse Bay Bands of Odawa Indians
MSF	Michigan Strategic Fund
State	State of Michigan
TOMAC	Taxpayers of Michigan Against Casinos

INTRODUCTION

In this appeal regarding the constitutionality of the amendment provision of the Compacts (Section 16), TOMAC continues to attempt to reargue the issues decided by this Court in *Taxpayers of Michigan Against Casinos v Michigan*, 471 Mich 306; 685 NW2d 221 (2004) ("*TOMAC*"). TOMAC frames the issue presented as a dispute regarding "the Legislature's delegation of its contracting power," yet at critical junctures bases its analysis on the premise that the Compacts and the Amendment entered into between LTBB and Governor Granholm are legislative in character. The very premise of TOMAC's argument – that the Compacts are legislation – was, however, rejected by this Court in *TOMAC*. When TOMAC in fact focuses on the power to contract, it rests its argument on a purported distinction between the Legislature's approval of the original Compact provisions and its pre-approval of compact amendments—a distinction the legal relevance of which TOMAC does not, and cannot, identify.

Section 16 authorizes the Governor to act on behalf of the State in negotiating amendments with the Tribes. **(App at 78a-79a).**[1] Amendments must be submitted to the Secretary of the Interior for approval pursuant to the IGRA, 25 USC 2701 *et seq*., and upon the effective date of the amendment, a certified copy must be filed with the Michigan Secretary of State, each house of the Legislature, and the Michigan Attorney General.[2] **(Compact § 16(C)&(D); App at 79a).**

[1] References to the Appendix cite to the Joint Appendix of Appellants State of Michigan and Little Traverse Bay Bands of Odawa Indians, filed in this Case Number 129822.

[2] Contrary to the assertions of Senators Sikkema and Johnson in their Brief of Amici Curiae, the Compacts do in fact provide the Governor with power to act on behalf of the State, without returning to obtain further approval of the amendments from the Legislature. (Brief of Amici Curiae Ken Sikkema, Senate Majority Leader, and Shirley Johnson, Chair of the Senate Appropriations Committee, at 20-24). The amici argument that the language of Section 16 does not permit the Governor to act on behalf of the State and to bind the State to amendments is based upon a strained interpretation of the contract language. Clearly, Section 16 provides that the State may act through the Governor in proposing and receiving proposals from the Tribes for amendment of the Compacts, and further provides that the "receiving party," i.e. the Governor on

Section 16 of the Compacts thus represents the Legislature's prior consent to contractual amendments to the Compacts negotiated and executed by the Governor on behalf of the State. Section 16 does not constitute a delegation of such power, and the case law upon which TOMAC relies in arguing that such "delegation" must be accomplished by statute is inapplicable. Further, even if Section 16 is construed as some sort of delegation of contracting power to the Governor, that Section still passes constitutional muster, as delegation of power to the Governor is controlled by standards that are different from the standards referenced in TOMAC's Brief (TOMAC Brief at 12-14), which are applicable to the delegation of legislating power to an executive agency. In fact, TOMAC takes the extraordinary position that "[e]ven if passed by statute," Section 16 of the Compacts would fail under the non-delegation doctrine. (TOMAC Brief at 12). This position, however, is simply indefensible both because the "delegation" in this case is to the Governor, not an agency, and also because the "delegation" is not of the power to legislate, but rather of the power to contract. TOMAC's argument, if accepted, would wreak havoc with long-accepted principles regarding the manner in which the State contracts.

In short, TOMAC has not shown that either Section 16 of the Compacts or the Amendment itself violates the Separation of Powers Clause, Const 1963, art 3, § 2, and the Court of Appeals erred in concluding otherwise. TOMAC also has not shown that Section 16 or the

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behalf of the State, may agree to a proposed amendment. **(App at 78a-79a).** None of the parties to this case – neither TOMAC, the State, LTBB, nor the other intervening defendants – has disputed this point.

Senators Sikkema and Johnson also argue that the Amendment is void pursuant to IGRA, which permits gaming only pursuant to compacts (and amendments) that have been validly approved by the State as well as by the Secretary of the Interior. Brief of Senators Sikkema and Johnson at 33-36. However, an IGRA challenge is not properly before this Court, for here the Court is presented only with the threshold question whether the manner in which the State bound itself to the Amendment was valid under state law. Nor did the Senators, or any other State legislator, raise this (or any other) objection regarding the Amendment when it was before the Secretary of the Interior for her approval, even though federal law provided them with 45 days in which to do so. *See* 25 USC 2710(d)(8)(C). The Secretary approved the Amendment on December 10, 2003. *See* 68 Fed Reg 68944.

Amendment itself violates the Appropriations Clause, Const 1963, art 9, § 17. This Court should reverse the Court of Appeals' decision regarding the Separation of Powers Clause, and reject TOMAC's belated Appropriations Clause challenge.

ARGUMENT

I. THE AMENDMENT PROVISION IN THE COMPACTS DOES NOT VIOLATE THE SEPARATION OF POWERS CLAUSE.

A. Section 16 Of The Compacts Does Not Purport To Grant Lawmaking Power To The Governor, and the LTBB Amendment Does Not Involve Lawmaking.

It is important to note from the outset that Section 16 of the Compacts does not purport to grant the Governor the power to enact legislation. It simply binds the State to contractual amendments negotiated by the Governor. To the extent that the Governor might seek to agree to an amendment that by its nature constitutes legislation, that amendment would clearly be invalid under this Court's decision in *TOMAC*.

In exercise of the authority granted by Section 16, Governor Granholm signed an amendment to the LTBB Compact on July 22, 2003 (the "Amendment"). **(App at 86a-89a).** The Amendment makes the following changes to the Compact:

- The Tribe may conduct gaming at a Second Site in Emmet or Charlevoix County, contingent upon approval of the local unit of government by formal action of the governing body, referendum, or other means satisfactory to the Governor; **(Amendment § 2(B)(1); App at 86a).**
- The Tribe agrees to prohibit gaming by those under the age of 21 at the Second Site;[3] **(Amendment § 4(I); App at 87a).**
- The Tribe agrees to report customer winnings to the State; **(Amendment § 4(O); App at 87a).**

[3] While TOMAC states that the Governor alone can set the legal gaming age at the LTBB's gaming facilities (TOMAC Brief at 4), this clearly is not the case, as such matters are issues of contract between the State – on whose behalf the Governor acted in concluding the Amendment – and the Tribe. The Governor cannot unilaterally act to do anything to change the Compacts. Amendment of the Compacts requires the consent of the Tribes.

- The duration of the Compact is extended from 20 years to 25 years from the date of the Amendment; **(Amendment § 12(A); App at 87a).**

- The manner in which tribal payments to the state will be calculated is revised; **(Amendment § 17(B)&(C); App at 87a-88a).**

- The payments to the State for the Second Site are conditioned upon there being no change in state law that is intended to or permits the operation of electronic games of chance or commercial casino games, including expansion of lottery games beyond that allowable under State law at the time of execution of the Amendment, within a 10-county radius;[4] **(Amendment § 17(B)(2); App at 87a-88a).**

- The parties agree that LTBB is to make payments to the State "as directed by the Governor or designee."[5] **(Amendment § 17(C); App at 88a).**

Each of the items included in the Amendment is the proper subject of a contract between the State and the Tribe. Under this Court's clear holding in *TOMAC,* none is legislative in character, as none purports to unilaterally regulate those subject to the power of the Legislature.[6] Const 1963, art 3, § 2. Since neither Section 16 nor the LTBB Amendment involves legislation, a traditional separation of powers analysis is inapplicable to this case.

B. Section 16 Is A Proper Exercise Of The Legislative Contracting Power.

The Legislature holds the contracting power of the State. As this Court held in *TOMAC*:

[4] Although TOMAC appears to argue that this provision creates a unique "ten-county monopoly," in reality the Amendment *shrinks* the exclusivity zone on which tribal payments are conditioned from the entire State, as set forth in the original Compacts, to a 10-county region around the Second Site. **(Compact § 17(B); App at 79a).** Furthermore, neither the Compact nor the Amendment prohibits the State from authorizing additional gaming – such authorization simply would have the contractual consequence of relieving the Tribes of the responsibility to make payments to the State.

[5] While TOMAC asserts that this provision permits the Governor to direct LTBB's payments to whatever agency, department, or quasi-governmental unit she chooses (TOMAC Brief at 4), as a constitutional officer, the Governor is constrained to act consistently with the Constitution.

[6] In its brief, TOMAC boldly asserts that, had the Court of Appeals considered the constitutionality of the Amendment itself "it would have further concluded that the Granholm Amendment's revenue sharing provision violates the Michigan Constitution's Appropriations Clause, and that the revenue sharing payments in the original compacts suffer from the same constitutional infirmity." (TOMAC Brief at 6). This is not only speculation, but the Court of Appeals specifically ruled, in granting the motion to strike, that these issues were not properly before that court. (Dkt. # 143). Furthermore, as is discussed in the Appellees' brief filed in Case Number 129816, TOMAC does not have standing to make these arguments.

> We have held that our Legislature has the general power to contract unless there is a constitutional limitation. It is acknowledged by all that our Constitution contains no limits on the Legislature's power to bind the state to a contract with a tribe; therefore, because nothing prohibits it from doing so, given the Legislature's residual power, we conclude that the Legislature has the discretion to approve the compacts by resolution. *TOMAC, supra* at 328 (citations omitted).

TOMAC argues that the Legislature may not exercise its power to contract in a manner that, in advance, approves future contract amendments entered into by the Governor on behalf of the State. In support of this argument, TOMAC cites to dicta in a case that is over sixty years old, *Roxborough v Michigan Unemployment Compensation Comm*, 308 Mich 505; 15 NW2d 724 (1944), and also relies on an ***unpublished*** decision of the Court of Appeals, *Conway Greene Co v Michigan*, unpublished opinion per curiam of the Court of Appeals, decided December 16, 2003 (Docket No. 242177, 243695). This unpublished case has no precedential effect. MCR 7.215(C)(1) ("An unpublished opinion is not precedentially binding under the rule of stare decisis."). Moreover, in the *Conway Greene* case, the Court of Appeals found that while the Legislative Council had statutory power to bind itself to a printing contract, it did not have the power to bind another state agency, the Legislature, or the State in general. *Conway Greene*, *supra*. Here, in contrast, *TOMAC* makes clear that the Legislature could properly bind the State to the Compacts by resolution. *TOMAC*, *supra* at 328-329.

Faced with this clear holding, TOMAC asserts that the Legislature's act of binding the State in advance with respect to future amendments is "radically different" from its act of binding the State after the fact with respect to the original Compacts. (TOMAC Brief at 11). Indeed, TOMAC's separation of powers challenge rests entirely on the slim reed of this purported distinction. But TOMAC points to absolutely no authority for such a distinction in the separation of powers jurisprudence, and no such authority exists. While TOMAC advances *policy* reasons that it contends disfavor the Legislature's pre-approval of amendments, it is clear

that policy is not the province of the Judiciary, but of the Legislature. As this Court stated in *TOMAC*, "this Court should not interfere with the Legislature's discretionary decision to approve the compacts by resolution." *Id*. at 329. This admonition against interference applies no less to the pre-approval of the Amendment than it does to the approval of the original Compact provisions themselves.[7]

C. Section 16 Of The Compacts Does Not Violate The "Traditional Non-Delegation Doctrine" Because of Allegedly Insufficient Limits on the Governor's Amendatory Power.

TOMAC also asserts that Section 16 of the Compact would violate the "traditional non-delegation doctrine" *even if Section 16 were passed by statute.* (TOMAC Brief at 12-15). But even assuming that Section 16 of the Compacts is a delegation (which it is not), the cases TOMAC cites in support of its position are not applicable to this case. First, the authority TOMAC cites in support of its argument deals with the delegation of lawmaking power, which is not at issue here. Clearly, the Governor must comply with the Constitution and may not agree to Compact terms that would be "legislative" in character, i.e., that would purport to bind someone subject to the Legislature's unilateral power. *TOMAC, supra* at 323-327.

Second, TOMAC argues that the Compacts violate the traditional non-delegation doctrine because the provisions in the Compact granting the Governor the power to amend the Compacts are not limited and specific, but instead are "minor and illusory." (TOMAC Brief at 12.) The cases upon which TOMAC relies for this argument, however, all deal with delegation to a state agency, not delegation to the Governor. While the Legislature must set forth specific standards for the exercise of legislative power delegated to an administrative agency, *Blue Cross Blue*

[7] TOMAC misconstrues LTBB's argument that the Compacts are extraconstitutional agreements. (TOMAC Brief at 11). This argument does not mean that the Compacts need not comply with the Constitution, but rather means simply that they are not explicitly contemplated by our Constitution, and are different from legislation or other areas of delegation of traditional legislative power. The Compacts are contracts that are subject to the usual tenets of contract law. *TOMAC, supra* at 328.

Shield of Michigan v Governor, 422 Mich 1, 51-52; 367 NW2d 1 (1985), those same considerations do not apply where the Legislature delegates power to the Governor.[8]

Moreover, when the Legislature delegates contracting power, it often provides fewer restraints on the exercise of that power than it would place on the delegation of legislating power. For example, Section 261(1) of the Management and Budget Act, MCL 18.1261(1), provides the Department of Management and Budget ("DMB") with the power to contract for all "supplies, materials, services, insurance, utilities, third party financing, equipment, printing, and all other items as needed by state agencies for which the legislature has not otherwise expressly provided." MCL 18.1261(2) further provides that DMB "shall make all discretionary decisions concerning the solicitation, award, amendment, cancellation, and appeal of state contracts." The statute thus provides very broad discretion to DMB in contracting on behalf of the State, which discretion is limited only by the requirement to utilize a competitive bidding process, unless DMB determines that another method is in the State's best interests. MCL 18.1261(3).

[8] In *City Council of Flint v Michigan*, 253 Mich App 378; 655 NW2d 604 (2002), for example, the City argued that the Legislature's delegation of power to the Governor to conduct a hearing regarding the City's financial situation was improper because the Legislature did not establish any procedural requirements for that hearing. In rejecting that argument, the Court of Appeals found:

> Although the Supreme Court has held that the Legislature must provide an administrative agency with standards for the exercise of the power delegated to it, we are not dealing here with an administrative agency; rather, this case involves a decision by the chief executive officer of the state, who stands on an equal level with the Legislature and the judiciary. "The Governor's power is limited only by constitutional provisions that would inhibit the Legislature itself." It is further well established that while the Legislature can authorize the exercise of executive power, it cannot place conditions on the exercise of that authority without violating the constitutional principle of separation of powers. *Id*. at 391 (citations omitted).

This reasoning is constitutionally sound, and suggests that in this case the Legislature also was not required to impose detailed standards for the Governor's power to amend the Compacts, since the Legislature specifically delegated this power to the Governor, and not to an executive agency. Indeed, under the *City Council* reasoning, to impose such standards would itself create separation of powers problems.

Were this Court to carry TOMAC's argument regarding the limits of contracting power to its logical conclusion, and to hold that the Legislature cannot pre-bind the State to contracts even by statute, the contractual authority of the DMB, along with that of a plethora of other state agencies and entities, would be called into question. Accordingly, TOMAC's argument from the "traditional non-delegation doctrine" misses the mark in at least four critical respects: (1) it relies upon cases dealing with the delegation of lawmaking, as opposed to contracting, power; (2) it relies upon cases involving a delegation of power to agencies, not the Governor; (3) it ignores the latitude with which the legislature has properly and repeatedly bound the State in advance to contracts negotiated by governmental entities; and (4) it ignores the critical teaching of *TOMAC* that the Legislature has broad power under the Constitution in approving agreements with sovereign Tribes, and may do so by resolution rather than by statute. For all of these reasons, TOMAC's non-delegation argument fails.

II. THE AMENDMENT ITSELF AND THE ORIGINAL COMPACTS DO NOT VIOLATE THE APPROPRIATIONS CLAUSE.

In addition to its arguments that Section 16 of the Compacts and the Amendment itself violate the Separation of Powers Clause, TOMAC also makes the novel, and procedurally improper,[9] argument that not only the Amendment, but the entire Compacts themselves, are invalid as violative of the Appropriations Clause of the Michigan Constitution. Const 1963, art 9, § 17 ("No money shall be paid out of the state treasury except in pursuance of appropriations made by law."). This argument, however, is without merit.[10]

[9] *See* Brief on Appeal of Intervening Defendants/Appellees Little Traverse Bay Bands of Odawa Indians and Gaming Entertainment (Michigan), LLC and Brief on Appeal of *Amici Curiae* Little River Band of Ottawa Indians, Nottawaseppi Huron Band of Potawatomi, and Pokagon Band of Potawatomi Indians (leave to file granted on July 13, 2006) in Case Number 129816.

[10] TOMAC argues that a finding that the Compacts are invalid would give the Legislature "the opportunity to address the troubling fact that only one of the seventeen Tribal casinos operating in Michigan today is currently making revenue sharing payments to the State."

First, TOMAC continues to insist that funds must go into the general fund. (TOMAC Brief at 1-2). Not all receipts of the State are deposited into the general fund, however, even funds that are subject to appropriation. *See, e.g.*, the Michigan Medicaid Benefits Trust Fund, MCL 12.255; the 21st Century Jobs Trust Fund, MCL 12.257; the Michigan Merit Award Trust Fund, MCL 12.260; the Insurance Bureau Fund, MCL 500.225; the Abandoned Vehicle Fund, MCL 257.252h; the Refined Petroleum Fund, MCL 324.21506a; and the Michigan Game and Fish Protection Trust Fund, MCL 324.43701 to 324.43705. Accordingly, MCL 18.1441(1) does not require that all money go into the "general fund." It simply requires that state funds be deposited pursuant to the directives of the state treasurer. As explained by LTBB and GE in Case Number 129816, however, funds held by the MSF are not state funds. (LTBB and GE Brief at 29-37). The language of the Appropriations Clause and of MCL 18.1441(1) simply does not apply to funds held by the MSF.

Furthermore, TOMAC's reliance on MCL 21.161 is similarly misplaced, as this general statute regarding the receipt of grants or gifts to the State does not control the more specific provisions of the MSF Act, which authorize the MSF to "accept gifts, grants, loans, and other aids from any person."[11] MCL 125.2007(b); *Carr v Midland Co Concealed Weapons Licensing*

TOMAC Brief at 6. This argument is disingenuous for at least three reasons. First, this case relates only to the four Tribes with 1998 Compacts, not to the seven other tribes that conduct gaming pursuant to the 1993 compacts. Second, TOMAC's clear intention in this case is to have the Court invalidate the Compacts in their entirety and to stop tribal gaming, a decision that would result in the cessation of all payments. To imply that invalidating the Compacts would somehow mitigate the "troubling fact" of non-payment therefore makes no sense. Finally, as TOMAC recognizes, to the extent that the Tribes are not making payments to the State, it is because the Tribes have asserted that *pursuant to the language of the Compacts agreed to by the Tribes and the State*, they are no longer required to make such payments.

[11] TOMAC asserts that all other sources of the MSF's funding aside from the tribal gaming revenues are "treated as appropriations subject to the control of the Legislature, including disbursement of tobacco settlement revenue to the Fund." (TOMAC Brief at 17, n 8). This statement is clearly inaccurate. Based on the Financial Audit of the MSF that TOMAC includes in its Appendix, as well as the more recent Financial Audit attached hereto as Tab A, the MSF has several sources of funding, including charges for services imposed directly by the MSF on the entities it serves, as well as other miscellaneous revenues. *See* TOMAC App. at

Bd, 259 Mich App 428, 439; 674 NW2d 709 (2003) ("[W]here two statutes conflict, the specific statute prevails over the general statute.").

The Amendment itself also does not violate the Appropriations Clause. The Amendment indicates that LTBB shall make payments "to the State, as directed by the Governor or designee." **(Amendment § 17(C)(i); App at 88a).** In applying this language, the Governor is constrained to act consistently with the Constitution in directing the funds to the State. The Governor's constitutional oath of office compels her to act in this manner. Const 1963, art 11, § 1; *Lucas v Board of County Road Comm'rs*, 131 Mich App 642, 663; 348 NW2d 660 (1984) ("[T]he Governor has no less a solemn obligation, see Const 1963, art 11, § 1, than does the judiciary to consider the constitutionality of his every action."). If the Governor were in the future to attempt to direct funds paid by LTBB pursuant to the Amendment in an improper manner, that action would present grounds for an "as applied" challenge to her action, but would not invalidate the language of the Amendment itself. TOMAC simply has not shown and cannot show that the language of the Amendment violates the Michigan Constitution or Michigan law.

CONCLUSION AND REQUEST FOR RELIEF

Section 16 of the Compacts and the Amendment itself do not violate the Separation of Powers Clause or the Appropriations Clause. The Court of Appeals' decision is erroneous and should be reversed.

204a-206a; *Financial Audit of the Michigan Strategic Fund (A Component Unit of the State of Michigan)*, October 1, 2003 through September 30, 2005, at 13, 19, 28 (noting that the MSF directly collects funds "for the Brownfield, industrial development revenue bond (IDRB), and Michigan Economic Growth Authority (MEGA) programs").

Respectfully submitted,

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